DOCKET NO:HHD-CV-17-6074140-S	:	SUPERIOR COURT
APRIL COULOUTE ET AL.	:	J.D. OF HARTFORD
V.	:	AT HARTFORD
GLASTONBURY BOARD OF EDUCATION, ET AL	:	MARCH 9, 2017

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE

I. FACTS

This action is brought by April Couloute on her own behalf and on behalf of her minor son Gabriel Couloute. The allegations stem from an alleged brain injury sustained by Gabriel Couloute while a member of the Glastonbury High School football team. The Plaintiff claims that the injuries occurred during the 2016 - 2017 football season while the minor plaintiff was a member of the team.(See Complaint Count 10 ¶¶ 5-9)

The plaintiff has commenced suit by way of a twenty four count complaint dated November 28, 2016. The complaint is brought against the Glastonbury Board of Education; Alan Bookman, Glastonbury Superintendent of Schools; Nancy E. Bean, Principal at Glastonbury High School; Trish Witkin, Athletic Director of Glastonbury High School; and Scott Daniels, Head Coach of the Glastonbury High School football team, hereinafter the ("defendants"). Counts One through Five are brought by April Couloute against all defendants and sound in due process deprivation pursuant to 42 U.S.C. § 1983. Counts Six

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through Nine are brought by April Couloute and sound in a Civil Action- RICO claim pursuant to 18 U.S.C. § 1961, et seq., against the defendants except they do not include the Glastonbury Board of Education. Counts Ten through Fourteen are brought on behalf of Gabriel Couloute PPA April Couloute and sound in Battery against all defendants. Counts Fifteen through Nineteen are brought on behalf of Gabriel Couloute PPA April Couloute against all defendants and sound in Fraud. Counts Twenty through Twenty Four are brought on behalf of Gabriel Couloute PPA April Couloute against all defendants and sound in Negligence.

The defendants hereby move to strike the entirety of the plaintiff's Complaint as to each and every count and all of the allegations contained therein for their failure to plead facts sufficient to support their claims.

II. ARGUMENT

The purpose of a motion to strike is "to test the legal sufficiency of a pleading. Practice Book, 1978, section 152. . . . " (Citations omitted) Ferryman v. Groton, 212 Conn. 138, 142 (1989); *See also* Novametrix Medical Systems Inc. v. Boc Group, 224 Conn. 210, 215 (1992). A motion to strike is properly used to challenge the legal sufficiency of a count of a complaint. Practice Book Section 152(1). The facts of the contested pleading are to be construed in the light most favorable to the non-moving party. Rowe v. Godou, 209

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Conn. 273, 278 (1988); Mingachos v. CBS, 196 Conn. 91, 109 (1985). If the facts provided under the allegations would support a valid cause of action, the motion to strike should be denied. Alarm Applications Company v. Simsbury Volunteer Fire Company, 179 Conn. 541, 545 (1988). If they do not, the motion should be granted.

A. The Plaintiffs' Claims for Due Process Deprivation, Counts One through Five Fail to Allege Facts Sufficient to Support a Claim Pursuant to 42 U.S.C. § 1983

The defendants submit that the claims contained in Counts One and through Five of the plaintiff's Complaint, which purport to sound in a due process violation of the Fourteenth Amendment, should be stricken as legally insufficient. The individual defendants, Alan Bookman, Nancy E. Bean, Trish Witkin and Scott Daniels, are considered state officials at all times hereto as described in the complaint and cannot be sued in their individual capacity. Specifically, the individual school defendants in this case may not be sued in their individual capacity because state officials acting in their official capacities are not "persons" within the meaning of § 1983, therefore, they cannot be sued under the Civil Rights Act. Spencer v. Doe, 139 F.3d 107 (C.A.2, 1998) The courts have held that "neither a state nor one of its agencies nor an official of that agency sued in his or her official capacity is a person under § 1983." Hafer v. Melo, 502 U.S. 21, 26, 116 L. Ed. 2d 301, 112 S. Ct. 358 (1991). The Eleventh Amendment of the Federal Constitution immunizes state

officials sued for damages in their individual capacities. In other words, a judgment against a public official in his official capacity imposes liability on the entity he or she represents and this is impermissible under the Eleventh Amendment. Kentucky v. Graham, 473 U.S. 159, 169, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985).

Title 42 U.S.C. § 1983 provides in part that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, or any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law." The plaintiff's complaint alleges that Alan Bookman was Glastonbury Superintendent of Schools at all times relevant hereto; Nancy E. Bean was Principal at Glastonbury High School at all relevant times hereto; Trish Witkin was Athletic Director of Glastonbury High School at all relevant times hereto; and Scott Daniels was Head Coach of the Glastonbury High School football team at all relevant times hereto. (See Complaint Counts 2-5 ¶ 2) The defendants acted in their official capacities with regard to any allegations of the managing and operating of the Glastonbury High School Football team; the allegations in the plaintiff's complaint involve claims relating to their official capacities in relation to the Glastonbury High School Football program. Under 42 U.S.C. § 1983 since the allegations against these defendants involve

claims of conduct while acting in their official capacity, the plaintiff cannot bring a claim against the individual defendants for due process deprivation.

The plaintiff may argue that the individual defendants are not state officials as they are not employed directly by the State of Connecticut but rather the Town of Glastonbury and the Glastonbury Board of Education, therefore they should be considered municipal officials. Even if the court determines that the moving defendants are not considered state officials but rather municipal officials, the plaintiffs' complaint fails to sufficiently plead a cause of action under 42 U.S.C. § 1983. "`To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law.'" Wilson v. Hryniewicz , 38 Conn. App. 715, 719-20, cert. den., 235 Conn. 918 (1995), quoting West v. Atkins , 487 U.S. a, 48, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1987). "These two elements denote two separate areas of inquiry: the plaintiff must prove a constitutional or statutory violation and that violation must have been committed by the defendant acting under color of law." Wilson v. Hryniewicz, supra , at 720. "Section 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred. . . . The first step in any such claim is to identify the specific constitutional right allegedly infringed." Albright v. Oliver , 510 U.S. 266, 271, 114 S.Ct. 807, 127 L.Ed. 807 (1994). "To create a constitutionally protected liberty interest, a

state regulation must employ language of an unmistakably mandatory character, requiring that certain procedures 'shall,' 'will,' or 'must be employed'. . . . It is only through the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates that a liberty interest arises." Silano v. Sag Harbor Union Free School Dist. Bd. , 42 F.3d 719, 724 (2d Cir. 1994). The plaintiffs' claim must fail as they cite no regulation that the school put in place in relation to the plaintiff that "shall", "will" or "must be employed;" the football program is wholly voluntary and any written consent to participate in the football program by the very nature of the word needs to be by consent, a fact conceded in the allegations of the plaintiffs' complaint. (See Complaint Count 1-5 ¶¶ 4,5)

After alleging that a written consent and approval had been signed by April Couloute on behalf of her minor son(See Complaint Count 1-5 ¶¶ 4,5), amounting to a contractual agreement between her and the school, the plaintiff in a perplexing statement, alleges that said procedure requiring consent wrongfully places the burden on the plaintiff. The allegations of Count One Through Five further assert that by placing the burden to consent on the plaintiff and requiring her to consent to this agreement the defendants have caused a severe deterioration and breakdown in the familial relationship between plaintiff and her minor son. The plaintiff attempts to elevate an alleged requirement to sign this consent, something not uncommon to request form a parent of a student/minor, to the dimension of

a violation of constitutional rights. The due process clause protects something more than an ordinary contract right. Its protection "is sought in connection with a state's revocation of a status, an estate within the public sphere characterized by a quality of either extreme dependence . . . or permanence . . . or sometimes both. . . ." (Emphasis omitted; footnote and internal quotation marks omitted.) S D Maintenance Co., Inc. v. Goldin , 844 F.2d 962, 966 (2d Cir. 1988). "A contract dispute . . . does not give rise to a cause of action under section 1983." Costello v. Town of Fairfield , 811 F.2d 782, 784 (2d Cir. 1987).

Nothing in the plaintiff's statement of facts even remotely implicates any state sponsored or authorized action, even by way of condoning said action, resulting in a violation of rights protected by "`the Fourteenth Amendment, which prohibits the states from denying federal constitutional rights and which guarantees due process, [and which] applies to acts of the states, not to acts of private persons or entities.' Rendell-Baker v. Kohn , 457 U.S. 830, 837, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982)." State v. Holliman , 214 Conn. 38, 43 (1990). The Fourteenth Amendment to the United States constitution guarantees that "[n]o state shall . . . deprive any person of life, liberty or property, without due process of law. . . ." U.S. Const., amend. XIV. Its purpose is to protect a person from "conduct that may be fairly characterized as `state action.'" State v. Holliman, supra , quoting Lugar v. Edmonson Oil Co ., 457 U.S. 922, 924, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). The participation in the Glastonbury High School Tomahawks football team

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program was voluntary and the complaint does not allege and cannot allege that the school created a law, rule or requirement for any child to participate in the program.

Section 1983 of 42 U.S.C. serves as a vehicle or "method for vindicating federal rights elsewhere conferred . . . [thus requiring that the] first step in any such claim is to identify the specific constitutional right allegedly infringed." Albright v. Oliver, supra. The various liberty interests protected by the constitution are many and often have been delineated as: "freedom from bodily restraint . . . the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship god according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." Board of Regents v. Roth, 408 U.S. 564, 572, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

To maintain a deprivation of rights claim the plaintiffs must allege and factually support a state action that has deprived them of a fundamental constitutionally protected right. "[T]he law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, education. . . cases recognize the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. . . . precedents have respected the private realm of family life which the state cannot

enter. . . ." Planned Parenthood of Southeastern PA. v. Casey , 505 U.S. 833, 851, 112 S.Ct. 2791, 123 L.Ed.2d 674 (1992). While the plaintiffs have alleged in their complaint that the school intervened in the familial relationship, they have not provided any facts to support this claim.

The plaintiffs have failed to allege a claim of how the school intervened in the familial relationship and any claim of constitutional magnitude. The only allegation that even supports any connection between the Plaintiffs and the School is the consent that the plaintiff mother signed, which was wholly voluntary, in order for her son to participate in the football program. Again, the plaintiff mother's claim revolves around her son's participation in a voluntary, not mandatory, football program which is not constitutionally protected. The plaintiff thus has failed to show any intrusion by any of the defendants into her familial relationship. "The liberty interests protected from governmental intrusion by the constitution would clearly be trivialized, if not denuded of meaning, were a court to accept the plaintiff's claims as constitutional in character or dimension." Finnucane v. Dandio, CV 0366182, 1997 Conn. Super. LEXIS 1487, at 17(Super. Ct. Feb. 7, 1997)

The causes of action alleged in Count One through Five of the plaintiffs' complaint do not show any factual allegations to support a claim of a due process deprivation. It is not enough for the plaintiffs to merely allege a constitutionally protected right; they must plead facts sufficient to support the claim. The plaintiff has failed to provide any factual support in

her complaint that supports any such claim. For these reasons, the defendants respectfully submit that these counts should be stricken.

B. The Plaintiffs' Claims of Civil Action- RICO, Counts Six through Nine Fail to Allege Facts Sufficient to Support a Claim Pursuant to 18 U.S.C. § 1961, et seq.

The defendants submit that the claims contained in Counts Six through Nine of the plaintiffs' Complaint, which purport to sound in a Civil Action- RICO claim pursuant to 18 U.S.C. § 1961, should be stricken as legally insufficient. RICO claims that are based on mail and wire fraud must state the circumstances constituting fraud with particularity by identifying the time, place, and content of the fraudulent communications, as well as the parties to the communications. Knoll v. Schectman, 275 F. App'x 50 (2d Cir. 2008). Heightened pleading standards are particularly important in RICO cases to protect and defend against baseless charges of racketeering that are serious, harmful, and expensive to defend. Limestone Dev. Corp v. Vill of Lemont, 520 F.3d 797, 803 (7th Cir. 2008) (affirming dismissal of RICO claim and warning against permitting a plaintiff "with a largely groundless claim to simply take up the time of a number of other people, [with the right to do so representing an opportunity to increase] the settlement value, rather than a reasonably founded hope that the [discovery] process will reveal relevant evidence."); Crest Const. II, Inc. v. Doe, 660 F.3d 346, 353 (8th Cir. 2011)(affirming dismissal of RICO claim

where "the complaint has alleged-but it has not 'shown'-'that the pleader is entitled to relief" quoting Iqbal, 556 U.S. at 678).

The plaintiffs' allegations under RICO are based on 18 U.S.C § 1341 and 18 U.S.C 1343 alleging mail and wire fraud. Elements of mail or wire fraud have been identified as "(1) a plan to scheme or defraud; (2) intent to defraud; (3) reasonable foreseeability that the mail or wires will be used; and (4) actual use of the mail or wires to further the scheme." Vicom, Inc. v. Harbridge Merch. Servs. Inc., No. 92-CV-2808, 1993 WL 8340 (N.D. Ill. Jan 8, 1993), judgment aff'd, 20 F. 3d 771 (7th Circ. 1994). The plaintiffs base their allegations supporting a RICO claim on the mailing of handbooks by the defendants seeking participation and financial support on behalf of the Glastonbury High School football program, and permitting the use of internet websites seeking participation in, purchasing equipment and logos and seeking solicitations on behalf of the Glastonbury High School football program. (See Complaint Count 6-9 ¶ 6) The plaintiffs' claims are insufficient as they do not identify two specific acts taken by the defendants to support a RICO claim, they fail to allege and factually support the pattern of racketeering activity undertaken by the defendants and they fail to allege and factually support the "enterprise" separate from the pattern of racketeering activity.

The prescribed activities under RICO are defined by 18 U.S.C. § 1962 (1976) which provides in pertinent part:

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(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in or the activities of which affect interstate or foreign commerce.
(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Kimmel, et al v. Peterson, et al, 565 F. Supp. 476, 489 (E.D.P.A. 1983).

The Second Circuit has maintained that in order to state a RICO cause of action, a plaintiff must allege that the defendant through the commission of "two or more acts" constituting a "pattern" of "racketeering activity" directly or indirectly invests in, or maintains an interest in, or participates in an "enterprise" the activities of which affect interstate commerce. Moss v. Morgan Stanley, Inc., 719 F.2d 5, 17 (2d Cir. 1983)

Under RICO's plain, statutory language, a plaintiff may satisfy this pleading element if the defendant committed "at least two acts of racketeering activity" within 10 years of one another. See 18 U.S.C. §1961(5). In addition, under the Knoll case, supra, if mail and wire fraud is alleged as in this case, the time, place, and content of the fraudulent communications, as well as the parties to the communications need to be specified. Knoll

v. Schectman, supra. The plaintiffs' allegations do not specifically identify the two claimed acts of racketeering activity by stating the time, place, and content of the fraudulent communications, as well as the parties to the communications. All that the plaintiff alleges is that handbooks and internet websites were used in furthering this racketeering activity. This failure is fatal to the RICO counts.

Further, despite its broad statutory definition, courts have held that proof of two acts of racketeering activity alone is insufficient to establish a pattern. Instead, a plaintiff also must offer proof that the predicate acts were continuous and interrelated. As a result, a plaintiff does not adequately plead a pattern of racketeering activity simply by alleging two predicate acts. Instead, a plaintiff must also allege facts that establish "continuity" and a "relationship" between those acts. The "relationship prong of this analysis is not difficult to meet—a plaintiff must show that the predicate acts have similar purposes, results, victims, methods of commission, or are otherwise interrelated by distinguishing characteristics." Kriston v. Peroulis, No. 09-CV-00909, 2010 WL 1268087, at *8 (D. Colo. Mar. 29, 2010).

The plaintiff than has to establish that those acts are continuous, which is a "centrally temporal concept" that arises from "Congress's desire to limit RICO's application to ongoing unlawful activities whose scope and persistence pose a special threat to social well-being." U.S. Airline Pilots Assoc. v. Awappa, LLC, No. 08-1858, 2010 WL 2979322, at *4 (4th Cir. July 30, 2010).

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The Supreme Court has explained that "[c]ontinuity is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 241 (1989). To allege closed-ended continuity, a plaintiff must allege facts showing that a "series of related predicate [acts] extend over a substantial period of time." Id. To allege open-ended continuity, on the other hand, a plaintiff must "plead facts that... give rise to a reasonable expectation that the racketeering activity will extend indefinitely into the future." See U.S. Airline Pilots Assoc., supra. The plaintiffs' pleading thus fails because it does not allege either the prerequisite closed or open-ended continuity to support the RICO claims. All that the plaintiffs allege is that handbooks and internet websites were used in furthering this alleged racketeering activity. Whiile that calim alone is tenuous at best, the plaintiffs further fail to state the time, place, and content of the alleged fraudulent communications and the relationship between the acts. Further, the plaintiffs have failed to allege how these acts are unlawful and pose a threat to the social well-being. These pleading issues are, again, fatal to the plaintiff's RICO claim. If "the complaint does not allege specific acts of racketeering activity, but instead draws legal conclusions ... were performed in violation of 18 U.S.C. § 1341 and 18 U.S.C. § 1343 on at least two actions ... [and] In addition, the plaintiffs have not alleged continuity as evidenced by different criminal episodes or relatedness of predicate acts as prescribed by case law, in

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order to prove a pattern" the complaint must be stricken. White v. O'Rourke, No. 24 86 25, 1990 Conn. Super. LEXIS 783, at 6 (Super. Ct. July 18, 1990) (Granting Motion to Strike)

Plaintiffs in a civil RICO case must plausibly allege the existence of an enterprise. A RICO complaint requires more than simply a list of entities and activities strung together and labeled as an association-in-fact enterprise. Richmond v. Nationwide Cassel, L.P., 52 F.3d 640 (7th Cir. 1995). "The 'enterprise' is not the 'pattern of racketeering activity;' it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved. . . ." United States v. Turkette, 452 U.S. 576, 583 (1981). "Two elements are necessary to establish an 'enterprise' under 18 U.S.C. §§ 1961(4), 1962(b), (c)...First, there must be evidence of an ongoing organization, formal or informal, and . . . evidence that the various associates function as a continuing unit...Second, the enterprise must have an existence separate and apart from the pattern of activity in which it engaged." Medallion TV Enterprises, Inc., et al v. Selectv of California, Inc., et al, 627 F. Supp. 1290, 1294 (C.D. Cal. 1986).

The plaintiffs have failed to allege how the defendants functioned as a continuing unit, as well as that their enterprise existed outside of the confines of managing the school's football program.

Conclusory or speculative allegations that an enterprise exists, standing alone, are insufficient to defeat this motion. CF Ass'n of Cleveland Firefighters v. City of Cleveland,

Ohio, 502 F.3d 545 (6th Cir. 2007) (addressing a Motion to Dismiss). Instead, a plaintiff must allege facts that, if proven, would establish that the defendants "associated together for the purpose of engaging in a course of conduct" and that they formed an "ongoing organization, formal or informal" that "function[ed] as a continuing unit" to achieve a common purpose. Id.

Indeed, to state a valid claim under RICO, a plaintiff must allege that the defendants "formed and organized a separate entity (formal or informal) on whose behalf they acted; it is not enough if they merely acted together to commit the wrong." Greenberg v. Blake, No. 09 Civ. 4347(BMC), 2010 WL 2400064 (E.D.N.Y. June 10,2010). Furthermore, to be liable under RICO, a defendant must have controlled or conducted the affairs of the enterprise, not merely its own affairs. Crichton v. Golden Rule Ins. Co., 576 F.3d 392 (7th Cir. 2009). The plaintiff's failure to plead both the formation and separate operation of a distinct enterprise is fatal to her RICO claim. See, e.g., Ouwinga v. John Hancock Variable Life Ins., No. 1:09cv60, 2010 WL 4386931 (W.D. Mich. Oct. 29, 2010) ("A RICO enterprise alleged as associated-in-fact must be pled as existing separately from the defendants' activity; it may not merely consist of the named defendants."); Myers v. Lee, No. 1:10cv131, 2010 WL 3745632 (E.D. Va. Sep. 21, 2010) (dismissing RICO claim where complaint failed to allege "a RICO enterprise that operates or functions in a way distinct from the defendants themselves"). The plaintiffs' RICO claims in the subject suit only reference the

defendants and the failures of their actions in their official capacity. The plaintiffs' RICO claims must fail.

Further, with respect to any damages resulting from the Defendant's conduct the plaintiffs have to show that the alleged conduct was the proximate cause of the claimed injury. The plaintiffs only alleges in their complaint that their business and property were affected by the alleged racketeering activity of the defendants but they fail to allege how. "[T]o state a claim under civil RICO, the plaintiff is required to show that a RICO predicate offense 'not only was a "but for" cause of his injury, but was the proximate cause as well.'" Hemi Group, LLC v. City of New York, 559 U.S. 1, 130 S. Ct. 983, 989, 175 L. Ed. 2d 943 (2010) (quoting Holmes v. Securities Investor Prot. Corp., 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)). Proximate cause requires "some direct relation between the injury asserted and the injurious conduct alleged," Holmes, 503 U.S. at 268; "[a] link that is 'too remote,' 'purely contingent,' or 'indirec[t]' is insufficient." Hemi Group, 130 S. Ct. at 989 (quoting Holmes, 503 U.S. at 271, 274). The "direct relationship" standard under RICO is stricter than the "foreseeability" analysis for common-law causation. See Hemi Group, 130 S. Ct. at 991 In essence, the standard means that the plaintiff must be the direct victim of the predicate acts. Zimmerman v. Poly Prep Country Day Sch., 888 F. Supp. 2d 317

The causes of action alleged in Counts Six through Nine of the plaintiff's complaint do not show any factual allegations to support a claim of a Civil Action-RICO claim. The plaintiffs do nothing more that cite to a triggering statute and provide unsupported legal conclusions. Further, although the defendants ubmit that the mclaims fail bfore reaching the issue of proximate cause, the plaintiffs' claim fails to factually allege how the purported RICO offenses proximately caused injuries to their business and property. For these reasons, the defendants respectfully submit that these counts should be stricken.

C. The Plaintiffs' Claims for Battery, Counts Ten through Fourteen Fail to Allege Facts Sufficient to Support the Claim and Should be Stricken as Legally Insufficient.

A person is liable for the tort of battery if "(a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) a harmful contact with the person of the other directly or indirectly results." (Internal quotation marks omitted.) Alteiri v. Colasso, 168 Conn. 329, 334, n.3, 362 A.2d 798 (1975), quoting 1 Restatement (Second), Torts §13 (1965). "The intent required for a battery . . . must be an intentional and unpermitted contact with the body of the plaintiff. Courts have also described the required intent as being unlawful . . . where unlawful means either intentional, wanton or negligent conduct in the application of force . . . [t]he contact complained of must be harmful or offensive to the

plaintiff's person." (Citations omitted; internal quotation marks omitted.) Tyson v. Franco-Camacho, Superior Court, judicial district of New Haven, Docket No. CV-05-5001078-S, 2012 Conn. Super. LEXIS 825 (March 23, 2012, Wilson, J.).

Intent to cause harmful contact and resulting harmful contact have to be alleged in the complaint to support a tort of battery. "The intent required for a battery is similar to that required for an assault . . . The touching must be an intentional and unpermitted contact with the body of the plaintiff. Courts have also described the required intent as being unlawful"; Correa v. Stevens, Superior Court, judicial district of Hartford, Docket No. CV 05 4012470, 2008 Conn. Super. LEXIS 1908 (July 18, 2008, Elgo, J.); where unlawful means "either intentional, wanton or negligent conduct in the application of force." Moriarty v. Lippe, 162 Conn. 371, 389, 294 A.2d 326 (1972). Consequently, "[t]he contact complained of must be harmful or offensive to the plaintiff's person." Correa v. Stevens, supra.

The plaintiffs have failed to allege how any of the defendants have engaged in the tort of battery. The prerequisite action for battery is contact between two parties. The plaintiffs have failed to allege that any of the defendants have made impermissible contact with minor plaintiff Gabriel Couloute at any time alleged in the complaint. The plaintiffs allege that the defendants "glorified" the sport of football and that the minor plaintiff "entered into combat-type situations in which repeated severe blows to the head are a certain consequence." (See Complaint Count 10-14 ¶ 5) At no point do the allegations

maintain that that there was any touching by any of the defendants. The plaintiff has thus failed to plead the prerequisite of the intent to contact and contact with the plaintiff by any of the defendants. The plaintiffs further allege that the minor plaintiff suffered repeated harmful bodily contact during the 2016-2017 football season including "severe blows to the head" as a result of playing football; (See Complaint Count 10-14 ¶ 6); but these allegations, even taken on their face, are due to the plaintiff's voluntary participation in the football program. Again, it is not alleged in any of the counts of the complaint that the defendants at any time intended to cause the minor plaintiff bodily harm and in fact did so, as are required allegations to plead a battery claim.

The causes of action alleged in Counts Ten through Fourteen of the plaintiffs' complaint do not provide any factual allegations to support a claim of battery. For these reasons, the defendants respectfully submit that these counts should be stricken.

D. The Plaintiffs' Claims for Fraud, Counts Fifteen through Nineteen, Fail to Allege Facts Sufficient to Support the Claim and Should be Stricken as Legally Insufficient

The essential elements that must be plead to maintain of a cause of action in fraud are "(1) a false representation was made as a statement of fact; (2) it was untrue and known to be untrue by the party making it; (3) it was made to induce the other party to act upon it; and (4) the other party did so act upon that false representation to his injury . . . All

of these ingredients must be found to exist; and the absence of any one of them is fatal to a recovery." (Internal quotation marks omitted.) Harold Cohn & Co. v. Harco International, LLC, 72 Conn. App. 51; accord Leonard v. Commissioner of Revenue Services, 264 Conn. App. 296. Additionally, "[b]ecause specific acts must be pleaded, the mere allegation that a fraud has been perpetrated is insufficient." (Internal quotation marks omitted.) Whitaker v. Taylor, 99 Conn.App. 719, 730, 916 A.2d 834 (2007). "[To] prevail . . . the plaintiff must . . . [allege] sufficient facts to demonstrate his reliance on the statement made by [the defendant]." Visconti v. Pepper Partners Ltd. Partnership, 77 Conn.App. 675, 683, 825 A.2d 210 (2003)

The plaintiffs' allegations maintain that the defendants have "omitted/or failed to disclose that the school's football equipment is inadequate and omitted/or failed to disclose the mounting body of evidence that severe blows to the head received in football competition can lead to Chronic Traumatic Encephalopathy (C.T.E.)" (See Complaint Count 15-19 ¶ 6) Further, the plaintiffs allege that the defendants' omissions "intended to deceive the minor plaintiff and to induce his participation in combat-type situations (football-games)" (See Complaint Count 15-19 ¶ 7)

In order to sufficiently allege fraud, the plaintiffs have to allege specifically that a false representation was made to the plaintiff and that the defendants knew the representation to be false. Here, the plaintiffs merely allege that the defendants omitted

and/or failed to disclose the inadequacy of football equipment and those severe blows to the head could lead to "C.T.E". Even assuming arguendo that said statement is true, this is insufficient to establish fraud. The plaintiffs allege that as a result of the perpetrated fraud minor plaintiff received severe head trauma resulting in a brain injury, but do not detail any false representation made by the defendants. The plaintiffs must allege and prove that the defendants' fraud through false representation and reliance of the minor plaintiff on said statements to his detriment.

First, the plaintiffs fail to allege that the defendants made false representations relating to the presumed safety of the football equipment and the effects of severe blows to the head leading to "C.T.E" knowing these statements to be false and second, the plaintiffs fail to allege that these statements induced the plaintiff to participate in football.

The causes of action alleged in Count Fifteen through Nineteen of the plaintiffs' complaint do not provide any factual allegations to support a claim of Fraud. For these reasons, the defendants respectfully submit that these counts should be stricken.

E. The Plaintiffs' Claims for Negligence, Counts Twenty through Twenty Four, Fail to Allege Facts Sufficient to Support the Claim and Should be Stricken as Legally Insufficient

The essential elements of a cause of action of negligence are well established. The plaintiff must allege and prove the existence of "duty; breach of that duty; causation; and

actual injury. Catz v. Rubenstein, 201 Conn. 39, 44, 513 A.2d 98 (1986); Calderwood v. Bender, 189 Conn. 580, 584, 457 A.2d 313 (1983)

In this particular action the minor plaintiff was participating in a contact sport that as alleged in the complaint, his mother signed a written consent form allowing him to participate. The allegation of mere negligence while participating in the football program fails as the plaintiff has to allege more than mere negligence but rather reckless disregard by the defendants when the plaintiff engages in an activity that could result in injury. The court in Jaworski v. Kiernan, 241 Conn. 399, 407-10, 696 A.2d 332, 336-38 (1997), held that as a matter of policy it was appropriate to adopt a standard of care imposing on an alleged negligent party in a team contact sport a legal duty to refrain from reckless or intentional conduct. Jaworski v. Kiernan, , supra. The court further determined that proof of mere negligence was insufficient to create liability. Id.

Even concluding that the defendants could foreseeably determine the consequence of the minor plaintiff's collisions due to his participation in the Glastonbury High School football program, a mere negligence allegation cannot survive against the defendants. In order to determine the extent of the defendants' responsibility, the court needs to consider " (1) the normal expectations of participants in the sport in which the plaintiff and the defendant were engaged; (2) the public policy of encouraging continued vigorous participation in recreational sporting activities while weighing the safety of the participants;

(3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions". Maloney v. Conroy, 208 Conn. 392, 400-401, 545 A.2d 1059 (1988) (looking beyond foreseeability to other pragmatic concerns to limit liability).

The plaintiffs have failed to allege any injuries resulting from reckless or intentional conduct of the defendants. This claim cannot be brought sounding in mere negligence and cannot survive as pleaded because of the very activity in which the minor plaintiff was participating. The plaintiffs allege that the defendants "failed to inform the minor plaintiff that the football equipment was inadequate" and that "they failed to inform the plaintiff of the mounting body of evidence demonstrating a positive link between blows to the head received in football and ... ("C.T.E")" (See Complaint Count 20-24 ¶ 6) The plaintiffs fail to allege any reckless or intentional conduct on the defendants affirmatively causing the plaintiff's injuries. Moreover, the plaintiffs fail to allege that the defendants knew of the inadequacy of the football equipment and intended to cause the plaintiff's injuries.

F. Public Policy Dictates that the Plaintiffs' Claims of Negligence for An Injury Sustained During Voluntary Participation IN a High School Team Sport Should Be Stricken.

Further, a proper balance of the relevant public policy considerations surrounding sports injuries arising from team contact sports also supports limiting the defendants' responsibilities for injuries resulting from playing a contact sport. "A final public policy

concern that influences our decision is our desire to stem the possible flood of litigation that might result from adopting simple negligence as the standard of care to be utilized in athletic contests. If simple negligence were adopted as the standard of care, every punter with whom contact is made, every midfielder high sticked, every basketball player fouled, every batter struck by a pitch, and every hockey player tripped would have the ingredients for a lawsuit if injury resulted. When the number of athletic events taking place in Connecticut over the course of a year is considered, there exists the potential for a surfeit of lawsuits" Jaworski v. Kiernan, supra.

The court in Jaworski concluded that the normal expectations of participants in contact team sports is that contact and possible injuries may happen, the court determined that the adoption of a reckless or intentional conduct duty of care standard for those participants was appropriate based on their expectations when taking the playing field and also based on a public policy argument.

Gabriel Couloutte, participated in a voluntary football program, and his mother April Couloute voluntarily signed a written consent form to allow her son to play football for the Glastonbury High School Tomahawks football team. The negligence counts fall short of alleging reckless and intentional conduct on behalf of the defendants. As such, they cannot stand.

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The causes of action alleged in Count Twenty through Twenty Four of the plaintiff's complaint do not provide any factual allegations to support a claim of reckless and intentional conduct by the defendants. For these reasons, the defendants respectfully submit that these counts should be stricken.

III. CONCLUSION

For these reasons as more particularly set forth above, the defendants respectfully request that this Motion to Strike all counts the Plaintiffs' Complaint be granted.

Defendants,
Glastonbury Board of Education Et AL

By _____
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CERTIFICATION

I hereby certify that this pleading complies with the requirements of Practice Book § 4-7 and a copy of the foregoing was mailed, U.S. Mail, postage prepaid, or electronically delivered pursuant to Practice Book § 10-13 to all counsel and pro se parties of record who have given written consent for electronic delivery, on the 9th day of March, 2017, as follows:

Irving J. Pinsky, Esq.
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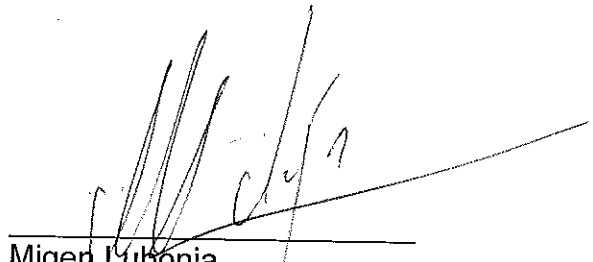

Migen Lubonja
Commissioner of the Superior Court